No. 87-170
and
No. 87-171

SEP 5 1987
JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM COPLEY, et al., Appellants,

vs.

HEIL-QUAKER CORP, et al., Respondents.

No. 87-170

WILLIAM COPLEY, et al., Petitioners,

vs.

HEIL-QUAKER CORP., et al., Respondents.

No. 87-171

APPELLANTS' REPLY BRIEF

AND

PETITIONERS' REPLY BRIEF

James T. Murray, Counsel of Record
MURRAY & MURRAY CO., L.P.A.
300 Central Avenue
Sandusky, Ohio 44870
Telephone: (419) 627-9700

Attorney for Appellants and Petitioner

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I. APPELLANTS' REPLY BRIEF

The Sixth Circuit's decision in Copley, et al. vs. Heil-Quaker Corp., et al., No. 86-3360 (6th Cir. May 20, 1987) will hereinafter be referred to simply as "the Copley decision."

A. "The Copley decision" restricts the authority of the states in a manner that goes significantly beyond any other Commerce Clause decisions of the Supreme Court of the United States.

Appellee admits that the issue raised is a "serious question." Motion to Affirm p. 7. Appellee argues, however, that "the Copley decision" is "an unremarkable application of well-established principles." Motion to Affirm, p. 10. This assertion is ill founded. Affirmance would represent a quantum leap in the restrictions on state authority circumscribed

by the Commerce Clause. Chief Justice Rehnquist has so stated.

> [I]n striking down the New Jersey statute I think that the Supreme Court of New Jersey has gone beyond any of our Commerce Clause decisions. Honda Motor Co. Ltd. v. Coons, 469 U.S. 1123, 1124 (1985).
>
> Although both Allenberg Cotton and Sioux Remedy involved States which closed their courts entirely to foreign corporations, the New Jersey Supreme Court held that the rationale of those cases extended to the mere tolling of a statute of limitations against corporations unrepresented in the State. Id. at 1125.
>
> I am not so sure that Allenberg Cotton and Sioux Remedy can be taken so far. The States involved in those cases totally barred foreign corporations from the state courts. Id.

B. The nondiscriminatory nature of the Ohio Savings Statute renders affirmance particularly inappropriate.

The Ohio Savings Statute is totally nondiscriminatory. In fact, it does not even

mention foreign corporations. Ohio courts have consistently applied the statute against Ohio residents who, after injuring another person in the State of Ohio, were not present in the state and therefore not amenable to service of process. See: Wetzel v. Weyant, 41 Ohio St. 2d 135, 323 N.E. 2d 711 (1975), Burman v. Lach, 2 Ohio App. 3d 317, 441 N.E. 2d 1150 (1982) and Fisher v. Austriaco, 2 Ohio App. 3d 133, 440 N.E. 2d 1241 (1981).

The importance of nondiscrimination in upholding a state statute against a constitutional challenge based on the Commerce Clause was recently addressed by the Supreme Court of the United States in CTS Corp. v. Dynamics Corp. of America, 55 U.S.L.W. 4478 (1987). The court stated:

> The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. Id. at 4483 (emphasis added)

An affirmance by the Supreme Court of the United States would represent a profound change in the right of individual states to protect its citizens' rights to assert claims against any one (not just foreign corporations) not amenable to service within the state.

To effect such a profound change without any deliberation would be inappropriate.

C. The prospectivity issue was timely raised by appellants. There was no authority for challenging the retroactive application of the Federal District Court's decision when it was rendered on March 3, 1984.

1. Appellee inexplicably suggests that because Bendix Autolite Corporation (an appellant in a

wholly different and distinct case) first raised the prospectivity issue in their reply brief, the Copleys should somehow be penalized thereby. The Copleys not only timely raised the issue of prospective versus retroactive application in their Plaintiffs-Appellants' Brief but cited therein every published decision holding that tolling statutes in violation of the Commerce Clause would be given prospective application only. How any failure on the part of Bendix Autolite Corporation could impact appellants herein is an unfathomable mystery. It is particularly unfathomable inasmuch as the Sixth Circuit never raised the issue in its ruling on the Copleys' appeal.

2. On and before March 3, 1984, the date the Federal District Court dismissed Heil-Quaker Corp., all applicable Commerce Clause decisions were applied retroactively. See McKinley v. Combustion Engineering, Inc., 674 F. 2d 812 (9th Cir. 1982) and Walter P. Coons v. American Honda Motor Co., Inc., 94 N.J. 307, 463 A. 2d 921 (1983).

3. After March 3, 1984, the date the Federal District court dismissed Heil-Quaker Corp., all of the applicable Commerce Clause decisions (with the exception of one decision) were applied prospectively. See Coons v. American Honda Motor Co., Inc., 96 N.J. 419, 476 A.

2d 763 (1984), Love v. Johns-Manville Canada, Inc., 609 F. Supp. 1457 (D.N.J. 1985) and Cohn v. G. D. Searle & Co., 784 F. 2d 460 (3d Cir. 1986).

The one case in which a retrospective application was applied, Cohn v. G. D. Searle & Co., 598 F. Supp. 965, (D. N.J. 1984), was reversed in Cohn v. G. D. Searle & Co., 784 F. 2d 460 (3rd Cir. 1986).

D. **Appellee's reliance on Griffith v. Kentucky, 55 U.S.L.W. 4089 (1987) is misplaced. Griffith explicitly confined itself to criminal cases. Id. at 4092.**

The only circuit court decision confronting the identical issue in a civil case held:

> [T]here can be no disputing that the Chevron test is generally applicable to issues of retroactivity, at least in civil cases.
>
> ...where the Constitution is held to immunize certain conduct from criminal punishment, as under the self-incrimination clause of the Fifth Amendment, such a holding necessarily operates retroactively. That principle has no applicability here. Cohn v. G. D. Searle & Co., 784 F. 2d 460, 466 (3rd Cir. 1986) (emphasis added)

If the Supreme Court of the United States were inclined to give any weight to the assertion that the rationale of Griffith is applicable here, one more compelling reason for plenary review is presented. Applying the Griffith rationale to civil cases would represent a dramatic departure from present law. See e.g. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), Cohn v. G. D. Searle & Co., 784 F. 2d 460 (3rd Cir. 1986), Love v. Johns-Manville

Canada, Inc., 609 F. Supp. 1457 (D. N.J. 1985), Walter P. Coons v. American Honda Motor Co., Inc., 96 N.J. 419, 476 A. 2d 763 (1984).

II. PETITIONERS' REPLY BRIEF

For the sake of brevity and simplicity, all reference to the private cause of action created pursuant to 15 U.S.C. Section 2072 will be referred to herein simply as the "statutory action."

A. Honeywell, Inc.'s (Honeywell) contention that Petitioners' "statutory action" is moot is (1) utterly without merit; and (2) improperly argued in response to the petition.

1.

Honeywell's argument is without merit because the Sixth Circuit never addressed the statute of limitation

issue as applied to Petitioners' "statutory action." The Sixth Circuit never addressed the statute of limitations question because it decided the threshold issue in favor of Respondent, Honeywell. The threshold question was whether Honeywell's failure to disclose a known product hazard created a private cause of action by virtue of 15 U.S.C. Section 2072.

If the Copleys prevail on the threshold issue, they would then be entitled to review (either by the Supreme Court of the United States or by the Sixth Circuit on remand) of their contention that no applicable statute of limitations bars their "statutory action." One example illustrates the point. One of the elements of any cause of action asserted pursuant to 15 U.S.C.

Section 2072 is a knowing failure to disclose a substantial product hazard. Therefore, Petitioners contend that the limitations period for this federally-created cause of action does not even begin to run until there is a disclosure. And this, of course, is a federal question. See e.g. Jones v. TransOhio Savings Assn., 747 F. 2d 1037, 1041 (6th Cir. 1984). Clearly, the Copleys' appeal is not moot.

2.

Honeywell's argument is not an appropriate response to the petition. The issue is whether or not the question is important enough to be reviewed by the Supreme Court of the United States.

Honeywell's response, in effect, asks the Court to (a) make a decision on the merits of the secondary issue (i.e. what if any statute of limitation defense will be available to Honeywell if the Copleys are entitled to assert a cause of action pursuant to 15 U.S.C. Section 2072); (b) rule (without the benefit of briefs or argument) in Honeywell's favor on this secondary issue; and (c) then deny review of the threshold issue based upon the favorable ruling for Respondents on the secondary issue.

B. **Honeywell suggests that the Supreme Court of the United States ignore the admitted conflict between the Minnesota Supreme Court on the one hand and the Eighth and Sixth Circuits**

on the other hand in the hope that doing so will eventually lead to a uniform rule without the necessity of any review by the Supreme Court of the United States. The argument should be rejected for at least two reasons:

1. The decisions that Honeywell suggests will evolve into a uniform rule represent a distinct minority view. Respondent's brief admits that the majority of federal courts have ruled otherwise. Therefore, there is little or no likelihood that a uniform rule will emerge from the two circuit court decisions.

2. The issue significantly impacts public safety and for that reason alone should not be delayed.

CONCLUSION

None of the responsive briefs dispute the following compelling reasons for review by the Supreme Court of the United States. The decision of the Sixth Circuit gives rise to:

1. An issue which the Supreme Court of the United States has already declared to be substantial. G. D. Searle & Company v. Cohn, 455 U.S. 404 (1982). Because the question is raised by way of an appeal, the Court must make a merit decision. It should be made with deliberation.

2. A Rule 17.1(a)[1] conflict (between two federal courts of appeal) was created by the Sixth Circuit decision. "The Copley decision" is in direct conflict with Cohn v. G. D. Searle & Co., 784 F. 2d 460 (3rd Cir. 1986).

3. A Rule 17.1(b) conflict (between a state court of last resort and a federal court of appeals) was created by the Sixth Circuit decision. "The Copley decision" is in direct conflict with Walter P. Coons v. American Honda Motor Co., Inc., 96 N.J. 419, 476 A. 2d 763 (1984).

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[1] All references to Rule 17 are to Rules of the United States Supreme Court, Rule 17 (1980).

4. A Rule 17.1(b) conflict (between a state court of last resort and a federal court of appeals) was created by the Sixth Circuit decision. "The Copley decision" is in direct conflict with Swenson v. The Emerson Electric Company, 374 N.W. 2d 690 (Minn. 1985).

The May 20, 1987 decision of the Sixth Circuit presents multiple issues, all of which uniquely meet well-defined criteria for review by the Supreme Court of the United States. By reviewing one lower court decision, the Supreme Court of the United States would resolve these multiple issues.

It is respectfully submitted that a plenary review should be granted and a writ should issue to the Sixth Circuit.

Respectfully submitted,

James T. Murray, Counsel of Record
Appellants and Petitioners